U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 12 2005

EAC 03 035 52190

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a postdoctoral research fellow at [redacted]ollege of Medicine at Yeshiva University. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner's work involves studying the roles of various genes in the progression of liver cancer and in the regeneration of liver tissue. The petitioner submits five witness letters with the petition. The authors of these letters are the same five individuals whom the petitioner names as references on his *curriculum vitae*.

Professor Charles E. Rogler, who served on the petitioner's thesis advisory committee at Albert Einstein College of Medicine, states:

> When he came to America, [the petitioner] had already made significant contributions to science. He had co-authored seven research papers . . . [that] dealt with the effects of retinoic acid on liver carcinoma in animal models. . . .
>
> For his Ph.D. research, [the petitioner] took on a very difficult project that . . . involved producing transgenic mice that over-express the murine Mgat3 gene in their liver. This involved preparation of a genetically engineered vector that would drive the expression of a transgene only in the liver. . . . [The petitioner] demonstrated that Mgat3 did not induce liver cancer when it was over-expressed. This led to the conclusion that a systemic factor from outside the liver must be responsible for the phenotype of tumor resistance in mice in which the Mgat3 gene is knocked out.
>
> [The petitioner] also helped produce and work with Mgat3 gene knockout mice. . . . [The petitioner] used carcinogenesis protocols in which mice are treated with Diethylnitrosamine (a potent chemical liver carcinogen), which normally induces liver cancer. . . . [The

> petitioner's efforts] have led to the discovery that the absence of the Mgat3 gene causes a significant *reduction in liver cancer in* the mice that are treated with DEN. . . .
>
> This research is one of the first in the field to identify a specific genetic lesion that can produce such a dramatic reduction in liver cancer progression. It opens up a large new area of investigation into how the modification of cell surface molecules can affect the ability of cells to escape from normal regulation and proceed down the path toward malignancy.

(Emphasis in original.) Dr. [redacted] associate professor and director of the Albert Einstein College of Medicine Cancer Center Gene Targeting Facility, was another member of the petitioner's thesis advisory committee. Dr. [redacted] states that the petitioner's "contributions to the field of carcinogenesis are well recorded by an impressive list of accomplishments and he clearly has achieved a leadership position in his field. . . . [The petitioner's] work is an important part of our program to develop pre-clinical models for human cancer syndromes and for the development of new therapeutic protocols."

The remaining witnesses (Prof. Stewart Sell of Albany Medical College, Prof. [redacted] of Tufts University School of Medicine, and Prof. [redacted] of Yeshiva University) similarly focus their comments on the petitioner's work with gene knockout mice in studying the causes of liver cancer. Prof. [redacted] states: "The very few US citizens who are now entering this demanding profession are insufficient to meet the needs of both the academic and industrial research laboratories." Prof. [redacted] asserts that the petitioner's departure from the research project at Albert Einstein College of Medicine "will severely affect the full accomplishment and original goals."

The petitioner submits copies of his published work, and documentation showing that one of his articles has been cited twice by independent researchers, and once by a collaborator [redacted]

The director issued a request for evidence, stating that the petitioner has not shown that his "contributions significantly outweigh those of his peers." In response, the petitioner submits a copy of another article, as well as a letter offering the petitioner a postdoctoral position of up to five years at the University of Pennsylvania. The petitioner accepted this offer on March 3, 2003, four months after Prof. [redacted] wrote that the petitioner should receive a waiver because the project underway at Albert Einstein College of Medicine would be impaired in the petitioner's absence.

Because the petitioner had not yet begun working at the University of Pennsylvania as of November 2002 when he filed the petition, we cannot find that his work at the University of Pennsylvania is a favorable factor in granting the requested waiver. Aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition; subsequent developments cannot establish eligibility. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). At the same time, we cannot ignore that the petitioner has left Albert Einstein College of Medicine; therefore, the continuation of his research at that school cannot reasonably form the basis of a waiver claim. At this stage, the petitioner can only demonstrate that his prior work, up to the date of filing, has had such a demonstrable impact on his field that we can reasonably expect the petitioner's work to continue to be especially influential within the field.

The petitioner submits three additional witness letters. Dr. [redacted] an associate professor at the University of Pennsylvania School of Medicine, states that he hired the petitioner as a postdoctoral fellow because the petitioner is "uniquely qualified for research on essentially all types of human cancer." Dr. [redacted] current projects involve studying the causes of breast cancer.

Professor [redacted] who had served on the petitioner's thesis defense committee at Albert Einstein College of Medicine, states that the petitioner "has shown the ability to conduct complex experiments and obtain new and important data contributing to major publications in the field of cancer." Prof. [redacted] neither identifies the "major publications" nor clarifies how they qualify as "major."

Dr. [redacted] an associate professor at Albert Einstein College of Medicine, states that the petitioner's previous work in China involved "the changes in sugar chains on the membrane of liver cancer cells after the treatment of RA and CAMP, and then the enzymatic mechanism governing the change of sugar chains." Dr. [redacted] states that "sugar chain binding to lectin LCA may have the potential of clinical screening of proteins with early stage liver cancer but AFP(-)." Dr. [redacted] states that petitioner's "studies provide unique insights into the inhibited liver cancer and will have a major significance in their quest to understand the progression and potential clinic therapy of liver cancer. . . . [The petitioner] is at the forefront of the cancer research and has contributed [in] a very significant way to our understanding of cancer and liver regeneration." Dr. [redacted] also makes it clear, however, that the petitioner's subsequent work does not involve liver cancer. The issue, then, is the extent of independent evidence to show that the petitioner's past work is generally considered to be as important and influential as the petitioner's collaborators and mentors claim.

The director denied the petition, having concluded that the record does not establish that the petitioner stands out from his peers to an extent that would warrant the special benefit of the national interest waiver.

On appeal, the petitioner submits four paragraphs of arguments relating to the director's decision. The single page is not signed or otherwise attributed, and we cannot determine whether its author is the petitioner, counsel, or some third party. Counsel's name appears nowhere on the appellate submission, although the appeal was mailed from counsel's New York address rather than from the petitioner's Pennsylvania address. The unsigned document indicates that the petitioner "has gained highly specialized and unique knowledge in cancer research," and that "the urgent national interest of winning the fight on cancer" justifies a waiver. The director did not dispute the intrinsic merit or national scope of cancer researcher. Nevertheless, there exists no blanket waiver to exempt all cancer researchers from the job offer requirement. Rather, the plain wording of section 203(b)(2)(A) of the Act indicates that aliens of exceptional ability in the sciences are generally subject to the job offer requirement. The burden is on the petitioner, therefore, to demonstrate that the petitioner has more to offer in the national interest than do most exceptional cancer researchers.

There do exist ways to quantify a given researcher's impact in the field (as opposed to his role in his own laboratory). Citation of published work is commonplace within academia and medical research; a given article will contain dozens of endnoted bibliographic citations. The higher the number of citations of a given article, the greater the impact of the cited article tends to be. We must, therefore, consider the *quantity* and

frequency of citations, rather than simply dividing researchers or articles into only two categories of "cited" and "not cited."

The petitioner submits additional evidence of citation of his published work. As noted above, the initial submission showed three citations of one article. The number of citations of that article has now grown to five; one of the new citations is a self-citation by the petitioner. A second article has five independent citations, plus one self-citation by a collaborator (again, [redacted] Thus, the petitioner has documented eight independent citations, roughly two per year since the 2000 publication of the earlier cited article.

The appellate submission includes the argument that the director gave too little weight to the letters submitted in support of the petition. It is true that the petitioner's employers and professors are in the best position to describe in detail what it is that the petitioner has been doing, but it seems equally true that if a professor is willing to take the time to write such a letter at all, then the letter will be favorable in its tone. The director did not question the petitioner's competence to conduct cancer research. Rather, the director determined that the letters did not show that the petitioner's work has had significant impact. That the initial group of witnesses consisted of the petitioner's employers and the references on his *curriculum vitae* did not dispel this impression.

Two new letters accompany the appeal. Both of these letters focus on the importance of the petitioner's work in Dr. [redacted] laboratory at the University of Pennsylvania. As we have already observed, the petitioner had not yet begun working for Dr. [redacted] at the time he filed the petition. Rather, he was working at Albert Einstein College of Medicine, submitting letters that stressed how important it would be for the petitioner to remain at Albert Einstein College of Medicine. We have already explained, also, that the petitioner cannot reasonably qualify for a November 2002 priority date based on work that he did not perform until March 2003. If the petitioner believes that his work in Dr. [redacted] laboratory qualifies him for a national interest waiver, the proper course of action would be to file a new petition with a later filing date that permits consideration of that work.

We also note that the potential five-year term of his postdoctoral appointment appears to be ample time for the University of Pennsylvania to pursue labor certification on the alien's behalf, if, as witnesses have claimed, U.S. workers with the necessary skill set for the job are difficult to find, and if that university desires to employ the petitioner permanently. If the university has no such plans, then the petitioner's existing nonimmigrant status already permits him to work in Dr. [redacted] laboratory. The record does not persuade us that, as of the petition's filing date, the petitioner had accumulated a track record of achievement that meaningfully distinguished him from other talented and dedicated researchers who seek new means to prevent or cure cancer and other life-threatening diseases. Simply listing the petitioner's achievements and declaring them to be significant cannot suffice in this regard.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual

alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.